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No. 98-378

In the

Supreme Court of the United States

October Term, 1998

JANET B. STONE, *et al.*,

Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR AND
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

BRIEF IN OPPOSITION

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90 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

QUESTION PRESENTED 1

LISTING OF PARTIES 1

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. THE PROCEEDINGS BELOW 3
B. THE FACTS 4

REASONS THE WRIT OUGHT NOT ISSUE 6

I. PETITIONERS FAILED TO PROPERLY RAISE, BEFORE THE SUPREME COURT OF NORTH CAROLINA, THE ISSUE THEY PRESENT TO THIS COURT. 6

II. PETITIONERS DEMONSTRATE NO CONFLICT BETWEEN THE DECISION BELOW, THIS COURT'S DECISIONS, AND THE DECISION IN *IRVING V. UNITED STATES*. 11

CONCLUSION 15

APPENDIX

Verified Claim of William Kelly, Jr.
of August 24, 1993 ..... 1a

Verified Claim of Mildred Lassiter Moates
of August 26, 1993 ..... 35a

Motion to Dismiss Claim, Filed
November 30, 1993 ..... 67a

TABLE OF AUTHORITIES

CASES

Adams v. Robertson, 117 S. Ct. 1028 (1997) 7

Irving v. United States, Nos. 96-2368
and 96-2369, 1998 WL 152941
(1st Cir. Apr. 8, 1998), *opin. withdrawn*,
146 F.3d 12 (1st Cir. June 8, 1998) 11,12

New York ex rel. Bryant v. Zimmerman,
278 U.S. 63 (1928) 8,9

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942) 9,10,11

Stone v. North Carolina Dep't of Labor,
347 N.C. 473, 495 S.E.2d 711 (1998) 5

United States v. Muniz, 374 U.S. 150 (1963) 12,13

STATUTES

28 U.S.C. § 1257 (1988 & Supp. 1998) 7

28 U.S.C. § 2674 (1990) 6,13

29 U.S.C. § 653(b)(4) (1990) 2,12

29 U.S.C. § 667 (1990) 8,9,11,12

29 U.S.C. § 667(c) (1990) 12

N.C. GEN. STAT. § 1A-1, Rule 12(b)(1), (2) and (6) (1997) 3

N.C. GEN. STAT. § 95-4 (1997) 8,9,10

N.C. GEN. STAT. § 143-291 *et seq* (1996) 8,9,10,11

N.C. GEN. STAT. § 143-291(a) (1994) 2

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On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Petitioners' statement of the Question Presented satisfies Respondents.

LISTING OF PARTIES

Petitioners' listing of the parties satisfies the Respondents.

OPINIONS BELOW

Petitioners accurately cite the Court to the opinions below.

JURISDICTION

Petitioners' citation of jurisdiction satisfies the Respondents, although Respondents contend that Petitioners fail to establish jurisdiction.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions cited by Petitioners, the Respondents contend the issue presented involves the following statutory provisions:

29 U.S.C. § 653(b)(4) of the Occupational Safety and Health Act provides that "[n]othing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

N.C. GEN. STAT. § 143-291(a) governing tort claims against state departments and agencies, provides, in relevant part, that "[t]he Industrial Commission shall determine whether

or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina."

STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW

Each of the one hundred eight (108) petitioners timely filed a verified affidavit of claim with the North Carolina Industrial Commission pursuant to the North Carolina Tort Claims Act, N.C. GEN. STAT. § 143-291 *et seq.* The Respondents timely moved to dismiss for lack of jurisdiction over the subject and person as well as for failure to state a claim upon which relief may be granted pursuant to N.C. GEN. STAT. § 1A-1, Rule 12(b)(1), (2) and (6). (App. at 67a) The Deputy Commissioner, on 12 June 1995, denied the motion, and the Respondents appealed to the Full North Carolina Industrial Commission. On 19 December 1995, the Commission affirmed the decision of the Deputy Commissioner.

Respondents timely appealed to the North Carolina Court of Appeals. On 4 February 1997, that court affirmed the North Carolina Industrial Commission. Respondents then filed a Petition for Discretionary Review with the Supreme Court of

North Carolina. The Supreme Court of North Carolina granted the petition on 5 June 1997 and, following briefing and argument, filed its opinion on 6 February 1998. Petitioners timely petitioned for rehearing on 13 March 1998. The Supreme Court of North Carolina denied rehearing on 2 April 1998.

B. THE FACTS

The Supreme Court of North Carolina noted that the case appeared before it upon a motion to dismiss. That court examined the verified claims and found the following facts:

> Because these claims arise upon defendants' motions to dismiss, we treat plaintiffs' factual allegations, which follow, as true. *See Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 646, 423 S.E.2d 72, 72 (1992). On 3 September 1991 a fire started in a hydraulic line near a deep fat fryer in the Imperial Foods Products chicken plant (the plant) in Hamlet, North Carolina. The fire grew in intensity and spread rapidly through the interior of the plant. Plaintiffs are either former employees of Imperial Foods who suffered injury in the fire or personal representatives of the estates of employees who died in the fire. They or their decedents (plaintiffs) were lawfully inside the plant at the

> time of the fire. Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible. After the fire the North Carolina Department of Labor and its Occupational Safety and Health Division (defendants) conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, defendants discovered numerous violations of the Occupational Safety and Health Act of North Carolina (OSHANC), including the plant's inadequate and blocked exits and inadequate fire suppression system. Defendants issued eighty-three citations against Imperial Foods Products for violations of OSHANC standards. Plaintiffs alleged, *inter alia*, that defendants had a duty under OSHANC to inspect the plant, defendants breached that duty by failing to inspect until after the fire, defendants' breach caused plaintiffs' injuries or deaths, and plaintiffs' injuries or deaths entitle them to damages in tort.

Stone v. North Carolina Dep't of Labor, 347 N.C. 473, 477, 495 S.E.2d 711, 713 (1998). Each of the one hundred eight (108) verified claims alleged essentially the same facts. A representative claim alleging a wrongful death appears in the

Appendix to this brief at pages 1a-34a. A representative claim alleging personal injury appears at pages 35a-65a.

REASONS THE WRIT OUGHT NOT ISSUE

I. PETITIONERS FAILED TO PROPERLY RAISE, BEFORE THE SUPREME COURT OF NORTH CAROLINA, THE ISSUE THEY PRESENT TO THIS COURT.

Petitioners ask this Court to decide:

> Did the Supreme Court of North Carolina violate the Federal OSHA Act when it concluded that the State of North Carolina could not be held liable for negligently enforcing its OSHA program on the ground that its OSHA enforcement authorities owed no duties to individual workers injured by their negligence?

(Petition at i.) Petitioners assert that, in conjunction with the Federal Tort Claims Act (United States Code Title 28, Chapter 171) and specifically 28 U.S.C. § 2674:

> The key to this case is the proposition that defendants can have no lesser duties than the federal government would have if it were operating the occupational safety and health

> program in North Carolina. 29 U.S.C.S. § 667 (1990).

(Petition at 21.) The Supreme Court of North Carolina never addressed this issue, and Petitioners failed to present this issue to that Court. Petitioners establish no jurisdictional federal question required by 28 U.S.C. § 1257.

This Court reviews state court judgments pursuant to 28 U.S.C. § 1257 only when the case presents a clear federal question. As this Court noted:

> With 'very rare exceptions,' *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531, 118 L.Ed.2d 153 (1992), we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams v. Robertson, 117 S. Ct. 1028, 1029 (1997). This Court assumes that Petitioners failed to raise the federal question when the state court record stands silent on the issue. To defeat this assumption, Petitioners must demonstrate that the state court possessed a fair opportunity to address the federal question presented in the Petition by showing that they presented the federal claim with fair precision and in due time.

Id. at 1030. The Petitioners clearly fail to do so. The record in the Supreme Court of North Carolina reveals no presentation of this federal issue.

The Supreme Court of North Carolina never addressed any federal question in this matter. That court considered this case as a state tort claim sounding in negligence filed against an agency of the State of North Carolina pursuant to N.C. GEN. STAT. §143-291 *et seq*. This negligence action rested upon the breach of an alleged duty imposed by N.C. GEN. STAT. § 95-4 (setting forth the authority, powers and duties of the North Carolina Commissioner of Labor). The Supreme Court of North Carolina noted that "[p]laintiffs assert that the defendants owed each claimant a duty under N.C.G.S. § 95-4 to inspect the Imperial Foods Products plant." (Petition App. at 11a) In its opinion, the court below never discussed the applicability to these claims of any federal statute, and Petitioners point this Court to nothing before the Supreme Court of North Carolina which asserted, as they argue here for the first time, that 29 U.S.C. § 667 through the Federal Tort Claims Act requires North Carolina to recognize a tort claim in favor of individual workers against the North Carolina Department of Labor for the failure to prevent job site injuries.

Petitioners assert that the necessary effect of the North Carolina court's judgment was to deny the federal claim. Thus, pursuant to *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), Petitioners contend they asserted a federal question now ripe for review by this Court. *New York ex rel.*

Bryant v. Zimmerman involved a constitutional challenge to a state statute in a habeas proceeding in which the Petitioner unequivocally asserted a Fourteenth Amendment challenge to a state statute. The lower of the two state appellate courts practically rested its decision upon a prior federal case in which this Court had sustained an equal protection clause challenge to a New York statute. *Id. at* 68-69. While New York's highest appellate court never mentioned the Fourteenth Amendment in its opinion, it discussed the case "as if it were considering the identical claim of invalidity" raised by the petitioner in the lower state appellate court. *Id. at* 69. Thus, this Court concluded that Zimmerman properly raised the federal claim.

Here, the record is very different. The Supreme Court of North Carolina discussed this case only in terms of N.C. GEN. STAT. § 143-291 *et seq.* and N.C. GEN. STAT. § 95-4. This discussion is consistent with the North Carolina Court of Appeals' treatment of the matter. Furthermore, Petitioners never argued before the Supreme Court of North Carolina that because, under the Federal Tort Claims Act, workers could bring a claim for negligent inspection against federal OSHA, 29 U.S.C. § 667 mandated that workers must possess the right to bring a similar claim pursuant to N.C. GEN. STAT. § 143-291 *et seq.* against the North Carolina Department of Labor, Division of Occupational Safety and Health. Thus, the presumption remains that Petitioners failed to properly present the federal issue in the court below.

Petitioners also assert, citing *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) that the North Carolina Supreme Court failed to base its decision upon an adequate and independent state ground. In *Standard Oil*, the Supreme Court of the State of California construed an exemption to a statute imposing a state motor vehicle fuel license tax. The California statute imposed the license tax, measured by gallonage, on the privilege of distributing any motor vehicle fuel. The statute exempted from taxation any fuel sold "to the government of the United States or any department thereof for official use of said government." Standard Oil sold fuel to army post exchanges, and filed suit challenging the constitutionality of the statute if construed as imposing a tax upon sales to army post exchanges. *Id.* at 482.

The Supreme Court of California interpreted the California statute and determined that army post exchanges did not constitute the government of the United States or any department thereof. Thus, Standard Oil was not exempt from paying the tax upon motor vehicle fuel sold to army post exchanges.

This Court found a federal question determined by a state court and subject to review. The California Court, in deciding the case, determined the relationship between the government of the United States and post exchanges. Thus, the decision involved a federal question, not a state law determination. *Id.* at 483

Here, the Supreme Court of North Carolina decided this matter solely upon the North Carolina Tort Claims Act, N.C. GEN. STAT. § 143-291 *et seq.*, as well as N.C. GEN. STAT. § 95-4 and North Carolina substantive tort law. Nothing in that determination of necessity involved a consideration of 29 U.S.C. § 667 or the Federal Tort Claims Act. Thus, *Standard Oil* stands inapplicable to a determination of jurisdiction in this matter.

Petitioners clearly failed to raise in the North Carolina Supreme Court the purported federal question upon which they now seek review. This Court should deny the writ.

II. PETITIONERS DEMONSTRATE NO CONFLICT BETWEEN THE DECISION BELOW, THIS COURT'S DECISIONS, AND THE DECISION IN *IRVING V. UNITED STATES.*

Petitioners assert that the Supreme Court of North Carolina's decision here conflicts with the decision of the United States Court of Appeals for the First Circuit in *Irving v. United States*, Nos. 96-2368 and 96-2369, 1998 WL 152941 (1st Cir. Apr. 8, 1998), *opin. withdrawn*, 146 F.3d 12 (1st Cir. June 8, 1998). Pursuant to the Federal Tort Claims Act, Irving asserted injury based upon a negligent inspection conducted by federal Occupational Safety and Health inspectors at a New Hampshire work site. Applying substantive New Hampshire tort law, the circuit court allowed recovery. Relying upon *Irving*, Petitioners contend that, because 29 U.S.C. § 667 requires a state occupational safety and health program to be as

effective as the federal program, the Supreme Court of North Carolina violated 29 U.S.C. § 667 by disallowing claims for negligent inspection by state inspectors under the North Carolina Tort Claims Act (N.C. GEN. STAT. § 143-291 *et seq.*). In their Supplemental Brief, Petitioners inform the Court that the First Circuit, sitting *en banc,* ordered the 8 April 1998 *Irving* opinion withdrawn. *See* 146 F.3d 12. Petitioners argue, however, that the Supreme Court of North Carolina's opinion still conflicts with the law as set forth in earlier *Irving* opinions and as established by other authorities. (Supp. Petition at 6.) A review of the *Irving* opinions and other authorities reveals no conflict. This Court should deny the writ.

As the lynchpin of their argument, Petitioners assert that 29 U.S.C. § 667 imposes upon the Respondents a duty to the Petitioners, enforceable in tort, to provide an OSHA program at least as effective as the federal program. 29 U.S.C. § 667 merely sets forth the conditions upon which the Secretary of Labor shall approve a state plan for OSHA enforcement. *See* 29 U.S.C. § 667(c)(1990). Any duties a state OSHA program might owe under that statute clearly stand owed only to the Secretary of Labor, not to individual workers in North Carolina. In fact, a review of the entire Occupational Safety and Health Act reveals no language to suggest that Congress, by that enactment, intended to affect state tort law and provide workers a right to sue state agencies in tort for asserted inadequacies of a state occupational safety and health program. Indeed, 29 U.S.C. § 653(b)(4) strongly suggests that Congress never intended the Occupational Safety and Health Act to

affect state tort law in any manner. Petitioners cite this Court no authority suggesting otherwise. Thus, Petitioners' argument fails.

No law in the prior *Irving* opinions conflicts with the law enunciated here by the Supreme Court of North Carolina. Irving's federal tort claim rested upon an allegedly negligent inspection by federal OSHA inspectors of a New Hampshire work site. 28 U.S.C. § 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" In short, the substantive law of the state which is the site of the alleged wrongful conduct governs claims under the Federal Tort Claims Act. *See United States v. Muniz*, 374 U.S. 150 (1963). A federal court deciding a federal tort claim arising in North Carolina would apply North Carolina substantive tort law, while a federal court deciding a tort claim arising in New Hampshire would apply New Hampshire substantive tort law.

Significantly, in the now withdrawn opinion, the *Irving* court applied substantive New Hampshire tort law and found liability for the negligent inspection based upon New Hampshire's Good Samaritan doctrine. In its 8 June 1998 Order withdrawing the April Opinion, the First Circuit ordered:

> The issues for *en banc* review include both the applicability of the Federal Tort Claims Act and its discretionary function exception, and the question of whether New Hampshire law

> (particularly that state's Good Samaritan doctrine) would hold a private actor liable under the circumstances of this case.

Thus, recovery for the plaintiff in *Irving* rests upon New Hampshire substantive tort law as well as the effect of the discretionary function exception found in the federal tort claims statutes. Nothing in the withdrawn *Irving* opinion, nor in the earlier opinions, suggests that the federal Occupational Safety and Health Act itself creates any duty owed to individual workers enforceable in tort.

In *Stone*, the Supreme Court of North Carolina applied North Carolina tort law to a state tort claim, just as a United States District Court would apply North Carolina tort law to a claim under the Federal Tort Claims Act where the allegedly wrongful act occurred in North Carolina. Such law includes the common law public duty doctrine. Petitioners fail to demonstrate how the result in this matter would have been different had the Federal Occupational Safety and Health Administration failed to inspect the Imperial Food Products North Carolina facility and had the Petitioners sued under the Federal Tort Claims Act. The difference between the *Irving* result with the result here reflects the nature of our federal system, not a violation of federal law. Nothing in the decision here appears inconsistent with the now withdrawn decision in *Irving*.

CONCLUSION

Petitioners establish no federal question reviewable by this Court. The Supreme Court of North Carolina properly applied North Carolina law. Petitioners demonstrate no conflict with any federal statute. This Court should deny the writ.

Respectfully submitted,

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October 30, 1998

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APPENDIX

TABLE OF CONTENTS

Verified Claim of William Kelly, Jr.
of August 24, 1993 ..... 1a

Verified Claim of Mildred Lassiter Moates
of August 26, 1993 ..... 35a

Motion to Dismiss Claim, Filed
November 30, 1993 ..... 67a

VERIFIED CLAIM OF WILLIAM KELLY, JR. AS FILED AUGUST 24, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-13053

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,	)	
Claimant,	)	VERIFIED CLAIM
v.	)	
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Claimant, William Kelly, Jr., by and through his undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant, William Kelly, Jr., is the duly authorized administrator of the estate of Brenda Gail Kelly, deceased, and is a resident of Richmond County, North

KELLY VERIFIED CLAIM, CONTINUED . . .

Carolina. A copy of the Letters of Administration certifying William Kelly, Jr., as the administrator of the estate of Brenda Gail Kelly is attached as Exhibit A, Letters of Administration, Richmond County, 91-E-219.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

4. Consistent with the mandate of N.C.G.S. 143-297 and other applicable law, claimant identifies by name in the following paragraphs the State employees upon whose negligence the claims stated herein are based. Claimant identifies these persons without prejudice to his right to name other individuals whose negligence may be revealed through discovery as supporting claims under the Tort Claims Act.

KELLY VERIFIED CLAIM, CONTINUED . . .

5. At times relevant to this action, John C. Brooks was the Commissioner of the North Carolina Department of Labor acting as an officer, employee and agent for defendants D.O.L. and North Carolina OSHA (sometimes jointly "defendants") acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Imperial Food Products, Inc. plant at 40 Bridges Street, Hamlet, Richmond County, North Carolina (sometimes "Hamlet plant').

6. Upon information and belief, at times relevant to this action, Michael D. Ragland was Deputy Commissioner of Health and Safety of D.O.L. and was an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Hamlet plant.

7. Upon information and belief, at times relevant to this action, James A. Oppold was the Director of North Carolina OSHA and an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC including at the Hamlet plant.

8. Upon information and belief, at times relevant to this action, Richard Amos was a Bureau Chief with North Carolina OSHA and was an officer, employee and agent of

KELLY VERIFIED CLAIM, CONTINUED . . .

defendants acting in the scope of his office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

9. Upon information and belief, at times relevant to this action, Frank Trogdon was District Safety Supervisor with North Carolina OSHA and was an officer, employee and agent of defendants acting within the scope of his office, employment, service, agency and authority and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

10. Upon information and belief, at times relevant to this action, David Poole, Charles W. Johnson, J. A. Bolton, and Douglas Jones were Compliance Safety and Health Officers with North Carolina OSHA and were officers, employees and agents of defendants acting within the scope of their offices, employments, services, agencies and authorities and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

11. Upon information and belief, at times relevant to this action Roseanne Morgan was a Health Supervisor and was an officer, employee and agent of defendants acting within the scope of her office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

KELLY VERIFIED CLAIM, CONTINUED . . .

12. Upon information and belief, at times relevant to this action Tom Hayes and Rodger Griffin were officers, employees and agents of defendants acting in the scope of their offices, employments, services, agencies and authorities, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

JURISDICTION

13. Pursuant to N.C.G.S. §143-291, the North Carolina Industrial Commission is constituted a court for the purpose of hearing and passing upon tort claims against all departments, institutions and agencies of the State, including the defendants.

THE IMPERIAL FOOD PRODUCTS FIRE

14. This action arises out of the negligent failure of the defendants to discharge duties of safety owed to the decedent, Brenda Gail Kelly, said negligence also amounting to an unreasonable, oppressive and manifest abuse of discretion and being a direct and proximate cause of the September 3, 1991 fire at the Hamlet, North Carolina, plant of Imperial Food Products Inc., which killed at least twenty-five (25) people, including Brenda Gail Kelly and injured at least fifty-six (56) others.

KELLY VERIFIED CLAIM, CONTINUED . . .

15. On September 3, 1991, the decedent Brenda Gail Kelly was an employee of Imperial Food Products, Inc., working at a chicken processing plant located in Hamlet, Richmond County, North Carolina. She worked in the packaging department.

16. On that date a fire developed in the processing area at the Imperial Foods plant in Hamlet.

17. Upon information and belief, a hydraulic line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation and spraying the flammable hydraulic fluid at high pressure against the floor and the nearby cooker.

18. Upon information and belief, the fire, which grew in intensity and spread rapidly through the interior and various work areas of the plant, caused a spread of toxic gases and black smoke throughout the building.

19. The decedent Brenda Gail Kelly was killed by this fire. Between the time of the fire and the time of her death due to smoke inhalation and flames, the decedent Brenda Gail Kelly incurred extreme pain and suffering from the flames and smoke inhalation and underwent horrific terror and mental anguish in an effort to escape from the building.

KELLY VERIFIED CLAIM, CONTINUED . . .

20. This fire was one of the worst industrial disasters in American history, and could and should have been prevented by defendants adequately enforcing workplace safety laws enacted for the protection of the decedent Brenda Gail Kelly.

21. Defendants negligently failed to fulfill their duties and unreasonably, oppressively and manifestly abused their discretion by not taking steps which they were legally required to take to protect the decedent Brenda Gail Kelly.

22. Upon information and belief, the defendants for the first time inspected the Hamlet plant after the September 3, 1991 fire, and from the ruins of the plant and charred remains of the fire victims determined that Imperial Food Products, Inc'. had conditions in violation of OSHANC leading to the issuance of fifty-four (54) citations for willful violations of OSHANC standards, twenty-three (23) citations for serious violations of OSHANC standards, and six (6) citations for other than serious violations of OSHANC standards, resulting in penalties being assessed against Imperial Foods totalling $808,150.

23. The death of Brenda Gail Kelly was a direct and proximate result of the negligent breach by the defendants of statutory, regulatory, and common law duties described herein, and amounted to an unreasonable, oppressive and manifest abuse of discretion.

KELLY VERIFIED CLAIM, CONTINUED . . .

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

24. Defendants owed duties to the decedent Brenda Gail Kelly and to William Kelly, Jr., administrator of her estate, which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the death of Brenda Gail Kelly and causing the claimant to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimant incorporates the allegations contained in paragraphs 1 through 23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

25. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §651 *et seq.* (sometimes "Federal OSHA Act").

26. Under 29 U.S.C. §667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (sometimes "State OSHA Program") is or will be at least as effective in providing safe and healthful employment and

KELLY VERIFIED CLAIM, CONTINUED . . .

places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

27. Under 28 U.S.C. §667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

28. Under 28 U.S.C. §667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

29. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. §1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

30. Pursuant to federal regulations located at 29 CFR §1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

KELLY VERIFIED CLAIM, CONTINUED . . .

31. Under 29 U.S.C. §667 and 29 C.F.R. §1901.1 state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least -as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

32. Under 29 U.S.C. §667and 29 C.F.R. §1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

33. Under 29 C.F.R. §1902.3 *et seq* states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

34. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

35. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

KELLY VERIFIED CLAIM, CONTINUED . . .

36. Under N.C.C.S. §95-126(b)(2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

37. N.C.G.S. §99-133 creates and establishes within the North Carolina Department of Labor a division known as the office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

38. Under N.C.G.S. §95-133, the Commissioner of Labor is required by law to appoint a Director to administer North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

39. Under N.C.G.S. §95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

40. Under N.C.G.S. §99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

41. Under N.C.G.S. §95-133, subject to the general supervision of the Commissioner of Labor, the Director is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty

KELLY VERIFIED CLAIM, CONTINUED . . .

of North Carolina OSHA to administer and enforce, including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out; (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

42. Under N.C.G.S. §95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

43. Under N.C.G.S. §95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

44. Under N.C.G.S. §95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating

to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

45. Under N.C.G.S. §95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

46. Under N.C.G.S. §95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

47. Under N.C.G.S. §95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

48. Under N.C.G.S. §95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

KELLY VERIFIED CLAIM, CONTINUED . . .

49. Under N.C.G.S. §95-138 and §95-139, civil and criminal penalties are established for employer violations of OSHANC.

50. Under N.C.G.S. §95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

51. Under N.C.G.S. §95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

52. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of Labor

investigation")after the September 3, 1991 fire at the Imperial Food Products, Inc., plant in Hamlet.

53. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

54. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide adequate personnel and plans for inspection pursuant to OSHANC.

55. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

56. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available

by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

57. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

58. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

59. Upon information and belief, and as found in the United States Department of Labor investigation, defendants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

60. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to

KELLY VERIFIED CLAIM, CONTINUED . . .

discharge their statutory, regulatory and common law duties, including those owed to claimant and Brenda Gail Kelly, deceased.

61. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

62. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

63. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

64. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the death suffered by Brenda Gail Kelly, deceased, and the damages suffered by claimant.

KELLY VERIFIED CLAIM, CONTINUED . . .

65. The defendants, through their agents and in the exercise reasonable care, should have conducted regular inspections of the Imperial Food Products plant in Hamlet, North Carolina.

66. Upon information and belief, Imperial Food Products, Inc. had other facilities, including in the City of Moosic in the Commonwealth of Pennsylvania. At least two inspections conducted on the Pennsylvania Imperial Foods plants in the mid-1980's by the United States Department of Labor, Federal OSHA division, led to citations being issued against Imperial Foods, Inc. for improper safety practices.

67. Upon information and belief, in one 1985 incident at the Imperial Foods plant in Moosic, Pennsylvania, employees were exposed to hot oil lines running near the floor between the fryer and the oven which were not protected. One of said lines burst and caused an employee to sustain burns over 35% of her body.

68. Upon information and belief, a 1987 inspection of the Imperial Foods plant in Moosic, Pennsylvania by Federal OSHA revealed that the means of ingress and egress were improperly constructed, labeled, and had inadequate accessibility. The OSHA inspector issuing citations for these violations, E. F. Donnelley, found that Imperial Foods top management demonstrated hostility and had "utter contempt for OSHA."

KELLY VERIFIED CLAIM, CONTINUED . . .

69. In the exercise of reasonable care, the defendants, through their agents, knew or should have known of Imperial Food Products' history of flagrant noncompliance with Federal OSHA requirements at the Moosic, Pennsylvania location that were identical or substantially similar to those in effect under OSHANC. Upon information and belief, said history of non-compliance was a matter of public record or was otherwise freely available to defendants who, having a duty to provide safe and healthful employment and places of employment at least equal to the standards mandated by the Federal OSHA Act, should in the exercise of reasonable care have known and acted upon such information by regularly inspecting and enforcing OSHANC standards at the Imperial Foods plant in Hamlet, North Carolina.

70. Upon information and belief, the conduct which Imperial Foods was cited for at its plant in Moosic, Pennsylvania was the same or a similar type of conduct to that which it was cited for in North Carolina after the September 3, 1991 fire, and which conduct caused the death of Brenda Gail Kelly.

71. In the exercise of reasonable care, defendants should have regularly inspected the Imperial Foods plant in Hamlet, North Carolina, to determine whether hazards such as those present at the Imperial Food Products, Inc., plant in Moosic, Pennsylvania and other hazards were present in Hamlet. Defendants' failure to discharge such duties prior to

the fire which took the life of Brenda Gail Kelly was the proximate and direct cause of the injuries and death suffered by Brenda Gail Kelly and the damages suffered by claimant.

72. Upon information and belief, the September 3, 1991 fire which resulted in the death of twenty-five persons, including Brenda Gail Kelly, and the injuries of fifty-six persons at the Hamlet, North Carolina facility was not the first fire at that plant. In fact, Imperial Food Products, Inc., had suffered a fire at its Hamlet plant sometime on or before November 26, 1980, and yet another fire on or before July 5, 1983. The defendants, in the exercise of reasonable care, knew or should have known of the previous fires at the same employer's facility at the same site, and therefore should have inspected the employer to protect the decedent Brenda Gail Kelly from any further such occurrences.

73. The defendants, through their agents named herein, owed a duty to Brenda Gail Kelly to inspect the Imperial Food Products, Inc., plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to the death of Brenda Gail Kelly. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused her death.

74. Upon information and belief, the defendants, through their agents, Commissioner of Labor John Brooks, Deputy Commissioner of Labor Michael Ragland, North

KELLY VERIFIED CLAIM, CONTINUED . . .

Carolina OSHA Director James Oppold, and others, failed to require that Imperial Food Products, Inc., be inspected despite all the information available to defendants which demonstrated that the Imperial Food Products, Inc., plant in Hamlet, North Carolina was highly likely to have working conditions in gross deviation from those prescribed by law.

75. Upon information and belief, the defendants, through Compliance Bureau Chief Richard Amos and District Safety Supervisor Frank Trogdon, failed to require that compliance officers or others in the employment of defendants inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina prior to the fire which gave rise to this action. Imperial Foods Products, Inc. had a presence in the State of North Carolina for a period of years before the fire which took the life of Brenda Gail Kelly, and in that entire time, no inspection was conducted despite the manifest and patent need to inspect regularly the Imperial Food Products, Inc., plant in Hamlet.

76. Upon information and belief, John Brooks, Michael Ragland, James Oppold, Richard Amos, and Frank Trogdon had supervisory and other responsibilities to assign compliance safety and health officers, including but not limited to Douglas Jones, Charles Johnson, J. A. Bolton, David Poole, Tom Hayes, and Rodger Griffin, to inspect industries in Richmond County and surrounding areas, including the Imperial Food Products, Inc., plant in Hamlet, but did not direct

KELLY VERIFIED CLAIM, CONTINUED . . .

that said plant be inspected. The defendants, through their agents, failed to require such inspections, thereby breaching duties owed to claimant and to the decedent Brenda Gail Kelly.

77. Defendants in the exercise of reasonable care and by reasonable inspection knew or should have known of the violative conditions at the Imperial Food Products, Inc., plant in Hamlet, including, without limitation, the following: (1) the failure of Imperial Foods to furnish each of its employees conditions of employment which were free from recognized hazards, (2) the failure of Imperial Food Products, Inc., to maintain a fire suppression sprinkler system as required by law, (3) the failure of Imperial Foods to provide a proper evacuation plan and means of egress should the plant catch fire, (4) the failure of Imperial Foods to provide unlocked, unblocked, and operable exits as required by law, (5) the failure of Imperial Foods to require adequate safety precautions considering the highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used, (6) the failure of Imperial Food Products, Inc., to label adequately exits or identify doors which were not exits so employees could find their way out of the plant in event of a fire, (7) the failure of Imperial Food Products, Inc., to provide adequate fire alarm facilities to alert employees to smoke or fire, (8) the failure of Imperial Foods to conduct fire exit drills in order to create an orderly means of escape, and (9) the failure of Imperial Food Products, Inc., to

train employees in fire extinguisher use and fire containment in emergencies to protect the lives of employees.

78. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-77 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

KELLY VERIFIED CLAIM, CONTINUED . . .

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of the decedent Brenda Gail Kelly at least as effective as that provided and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries and death of decedent, Brenda Gail Kelly.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in

KELLY VERIFIED CLAIM, CONTINUED . . .

the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there - which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire - and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which took the life of Brenda Gail Kelly.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc., plant-in Hamlet, North Carolina, but-negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc., plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to claimant and Brenda Gail Kelly and was a proximate cause of her death.

79. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were

KELLY VERIFIED CLAIM, CONTINUED . . .

breaches of duty to claimant and Brenda Gail Kelly, deceased, and were the proximate and direct cause of his death, for which claimant is entitled to recover.

80. William Kelly, Jr., administrator of the estate of Brenda Gail Kelly, deceased, is entitled under North Carolina law to recover on behalf of the heirs of Brenda Gail Kelly for the pain and suffering he underwent as a result of the negligence and unreasonable, oppressive and manifest abuse of discretion of defendants, and for the funeral expenses, and the monetary value of the decedent to the heirs, including but not limited to loss of net income, services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices, and advice.

81. Upon information and belief, Brenda Gail Kelly, deceased, suffered extreme mental and physical anguish as a result of the smoke and fire at the Imperial Food Products plant in Hamlet, North Carolina, for which the claimant is entitled to recover.

82. Brenda Gail Kelly was a much loved and valued family member and provided to her heirs at law significant, substantial, meaningful and valuable services, protection, care, assistance, society, companionship, comfort, guidance, kindly offices, and advice which, as a direct and proximate result of the negligent acts and omissions of the defendants and their unreasonable, oppressive, and manifest of discretion, were lost

KELLY VERIFIED CLAIM, CONTINUED . . .

forever to the heirs of Brenda Gail Kelly and for which her estate is entitled to compensation, for total damages in the amount of $100,000.00.

WHEREFORE, claimant prays that he: (1) Have and recover of defendants damages in excess of $100,000.00 as a result of the negligent acts and omissions and the unreasonable, oppressive and manifest abuses of discretion by the defendants, and (2) such other and further relief as may be appropriate.

/s/ Henry L. Kitchin

/s/ Stephan R. Futrell
LEATH, BYNUM, KITCHIN & NEAL, P.A.
111 Washington Street
Post Office Box 1657
Rockingham, North Carolina 28379
Telephone (919) 997-2206

ATTORNEYS FOR CLAIMANT, WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY, Deceased

/s/ Joseph W. Moss

KELLY VERIFIED CLAIM, CONTINUED . . .

/s/ J. Alexander S. Barrett
ADAMS, KLEEMEIER, HAGAN, HANNAH & FOUTS
Post Office Box 3463
301 N. Elm Street, Suite 500
Greensboro, North Carolina 27401
Telephone: (919) 343 1600
ATTORNEYS FOR CLAIMANT WILLIAM KELLY, JR., ADMINISTRATOR OF THE ESTATE OF BRENDA GAIL KELLY, Deceased

KELLY VERIFIED CLAIM, CONTINUED . . .

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-

WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY, Deceased,	)	
Claimant,	)	AFFIDAVIT AND VERIFICATION
v.	)	
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

William Kelly, Jr., having first been duly sworn, deposes and says:

1. The name of the claimant is William Kelly, Jr., Administrator of the Estate of Brenda Gail Kelly, deceased. Mr. Kelly resides at Route 1, Box 214B, Rockingham, North Carolina.

KELLY VERIFIED CLAIM, CONTINUED . . .

2. The claims asserted against the North Carolina Department of Labor, and the North Carolina Department of Labor, Division of Occupational Safety and Health, and the names of the individual employees, upon whose negligence the claims are based, are included in the Verified Claim to which this Affidavit and Verification is attached.

3. The claimant is seeking to recover all damages permitted under the North Carolina Tort Claims Act, N.C.G.S. §143-291, *et seq.*

4. The time and place the injury occurred are described in the Verified Claim to which this Affidavit and Verification is attached.

5. The facts and circumstances surrounding the injury and giving rise to this claim are stated and described in the Verified Claim to which this Affidavit and Verification is attached.

6. The contents of the Verified Claim to which this Affidavit and Verification is attached are adopted and incorporated herein by reference as though specifically set forth herein.

7. The contents of the Verified Claim are true to the knowledge of the undersigned, except as to those matters

KELLY VERIFIED CLAIM, CONTINUED . . .

stated on information and belief, and as to those matters, he believes them to be true.

Further affiant sayeth not.

This 24th day of August 1993.

/s/ WILLIAM KELLY, JR.

Subscribed and sworn to
before me this 24th day of August, 1993.

/s/ Pamela S. Griner
Notary Public

My Commission Expires: 3-29-98

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EXHIBIT A

STATE OF NORTH CAROLINA

Richmond County

File No. 91-E-219
In The General Court of Justice
Superior Court Division
Before The Clerk

In The Matter Of The Estate Of:	
Name Brenda Gail Kelly	LETTERS Administration G.S. 28A-6-1

The Court in the exercise of its jurisdiction of the probate of wills and the administration of estates, and upon application of the fiduciary, has adjudged legally sufficient the qualification of the fiduciary named below and orders that Letters be issued in the above estate.

The fiduciary is fully authorized by the laws of North Carolina to receive and administer all of the assets belonging to the estate, and these Letters are issued to attest tot hat authority and to certify that it is now in full force and effect.

Witness my hand and the Seal of the Superior Court.

Name And Title Of Fiduciary William Kelly, Jr. Administrator	Date Of Qualification September 11, 1991
Address Route 1 Box 214 B	Clerk Of Superior Court Catherine S. Wilson
City, State, Zip Rockingham, North Carolina 28379	EX OFFICIO JUDGE OF PROBATE
Name And Title Of Fiduciary	
Address	Date Of Issuance January 20, 1993
City, State, Zip	Signature /s/ Kathy C. Gainey
SEAL	✓ Deputy CSC ___ Assistant CSC

AOC-E-403, Rev. 6/87

VERIFIED CLAIM OF MILDRED LASSITER MOATES OF AUGUST 26, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I.C. NO. TA-

MILDRED LASSITER MOATES and OLIN DELLANO MOATES,	)	
Claimants,	)	
v.	)	VERIFIED CLAIM
NORTH CAROLINA DEPARTMENT OF LABOR, and NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Claimants, Mildred Lassiter Moates and Olin Dellano Moates by and through his/her undersigned counsel, alleges and says as follows:

THE PARTIES AND DEFENDANTS' OFFICERS, EMPLOYEES AND AGENTS

1. Claimant Mildred Lassiter Moates (sometimes herein referred to as "claimant") is a citizen and resident of Richmond County, North Carolina. Olin Dellano Moates, also a claimant herein, is a citizen and resident of Richmond

MOATES VERIFIED CLAIM, CONTINUED . . .

County, North Carolina. Claimant and Olin Dellano Moates are husband and wife, having married December 29, 1960.

2. Defendant the North Carolina Department of Labor (sometimes "D.O.L.") is a political subdivision of the State of North Carolina.

3. Defendant the Division of Occupational Safety and Health, also known as the Office of Occupational Safety and Health (sometimes "North Carolina OSHA") is a political subdivision of the State of North Carolina and is an office within the North Carolina Department of Labor responsible for promulgation and enforcement of workplace safety standards, and for the performance of duties under the Occupational Safety and Health Act of North Carolina (sometimes "OSHANC") and other applicable laws.

4. Consistent with the mandate of N.C.G.S. 143-297 and other applicable law, claimants identify by name in the following paragraphs the State employees upon whose negligence the claims stated herein are based. Claimants identify these persons without prejudice to their right to name other individuals whose negligence may be revealed through discovery as supporting claims under the Tort Claims Act.

5. At times relevant to this action, John C. Brooks was the Commissioner of the North Carolina Department of Labor acting as an officer, employee and agent for defendants

MOATES VERIFIED CLAIM, CONTINUED . . .

D.O.L. and North Carolina OSHA (sometimes jointly "defendants") acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Imperial Food Products, Inc. plant at 40 Bridges Street, Hamlet, Richmond County, North Carolina (sometimes "Hamlet plant"), a chicken processing plant that initially began operations in the year 1980.

6. Upon information and belief, at times relevant to this action, Michael D. Ragland was Deputy Commissioner of Health and Safety of D.O.L. and was an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC, including at the Hamlet plant.

7. Upon information and belief, at times relevant to this action, James A. Oppold was the Director of North Carolina OSHA and an officer, employee and agent of defendants acting in the scope of his office, employment, service, agency and authority and having responsibilities for the enforcement of OSHANC including at the Hamlet plant.

8. Upon information and belief, at times relevant to this action, Richard Amos was a Bureau Chief with North Carolina OSHA and was an officer, employee and agent of defendants acting in the scope of his office, employment,

service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

9. Upon information and belief, at times relevant to this action, Frank Trogdon was District Safety Supervisor with North Carolina OSHA and was an officer, employee and agent of defendants acting within the scope of his office, employment, service, agency and authority and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

10. Upon information and belief, at times relevant to this action, David Poole, Charles W. Johnson, J. A. Bolton, and Douglas Jones were Compliance Safety and Health Officers with North Carolina OSHA and were officers, employees and agents of defendants acting within the scope of their offices, employments, services, agencies and authorities and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

11. Upon information and belief, at times relevant to this action Roseanne Morgan was a Health Supervisor and was an officer, employee and agent of defendants acting within the scope of her office, employment, service, agency and authority, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

MOATES VERIFIED CLAIM, CONTINUED . . .

12. Upon information and belief, at times relevant to this action Tom Hayes and Rodger Griffin were officers, employees and agents of defendants acting in the scope of their offices, employments, services, agencies and authorities, and having responsibilities for enforcement of OSHANC, including at the Hamlet plant.

JURISDICTION

13. Pursuant to N.C.G.S. §143-291, the North Carolina Industrial Commission is constituted a court for the purpose of hearing and passing upon tort claims against all departments, institutions and agencies of the State, including the defendants.

THE IMPERIAL FOOD PRODUCTS FIRE

14. This action arises out of the negligent failure of the defendants to discharge duties of safety owed to claimants, said negligence also amounting to an unreasonable, oppressive and manifest abuse of discretion and being a direct and proximate cause of the September 3, 1991 fire at the Hamlet, North Carolina, plant of Imperial Food Products Inc., which killed at least twenty-five (25) people and injured at least fifty-six (56) others, including claimant.

15. On September 3, 1991, claimant was an employee of Imperial Food Products, Inc., working at a chicken

processing plant located in Hamlet, Richmond County, North Carolina. She worked in the trim room.

16. On that date a fire developed in the processing area at the Imperial Foods plant in Hamlet.

17. Upon information and belief, a hydraulic line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation and spraying the flammable hydraulic fluid at high pressure against the floor and the nearby cooker.

18. Upon information and belief, the fire, which grew in intensity and spread rapidly through the interior and various work areas of the plant, caused a spread of toxic gases and black smoke throughout the building.

19. The claimant Mildred Lassiter Moates was injured by this fire. Her injuries include diffuse brain damage; legal blindness; anoxic encephalopathy secondary to smoke inhalation; cognitive, physical and psychosocial deficits, severe; post-traumatic stress disorder, severe, chronic and permanent, manifested by nightmares and hallucinations; decreased level of awareness to the environment; decreased level of consciousness, including safety awareness; tracheobronchial and pulmonary burns secondary to smoke inhalation, and she was otherwise injured about her

MOATES VERIFIED CLAIM, CONTINUED . . .

musculoskeletal and nervous systems. For the necessary treatment of her injuries, claimant has submitted to multiple and extensive operations, medical and surgical procedures including bilateral lower extremity tendon releases which have resulted in a hobbled gait. As a result of her injuries, claimant has been caused to endure severe and debilitating pain and suffering of both body and mind which will continue for the balance of her life. She has incurred numerous and costly medical bills in an amount not yet determined, which medical bills will continue to be incurred over the balance of her life for her necessary medical care and treatment, attendant nursing care, and maintenance. Further, because of her injuries, claimant has been rendered permanently and totally disabled, has lost a great deal of wages, has suffered a permanent and total loss of wage-earning capacity, and her enjoyment of life has been permanently diminished. The fiery explosion, the rapid burning of the plant, the mass confusion and total darkness as to whether claimant would be able to escape this inferno and even death itself, and the other events immediately surrounding the occurrence of this industrial workplace tragedy were sudden, shocking and extraordinarily frightening and physically damaging to claimant and her nervous system. She experienced profound horror, and this experience had a direct emotional impact upon her. It was reasonably foreseeable that the defendants' negligence and abuses of discretion, hereinafter described, would cause this claimant and others to suffer severe emotional distress and mental anguish, and the claimant did in fact suffer severe emotional distress and mental anguish as a

direct and proximate result of the defendants' said conduct. As a result of the severe emotional distress and mental anguish which claimant suffered, she has been further caused to suffer the aforementioned post-traumatic stress disorder, this being a generally recognized condition by mental health professionals, and the claimant has been so diagnosed. As mentioned above, the claimant's post-traumatic stress disorder is severe, chronic and permanent.

20. Resulting from the injuries suffered by claimant Mildred Lassiter Moates, her husband, claimant Olin Dellano Moates, has been denied the consortium, conjugal services, society, companionship, affection and sexual relations with his wife.

21. This fire was one of the worst industrial disasters in American history, and could and should have been prevented by defendants adequately enforcing workplace safety laws enacted for the protection of claimant.

22. Defendants negligently failed to fulfill their duties and unreasonably, oppressively and manifestly abused their discretion by not taking steps which they were legally required to take to protect claimant.

23. Upon information and belief, the defendants for the first time inspected the Hamlet plant after the September 3, 1991 fire, and from the ruins of the plant and charred remains

of the fire victims determined that Imperial Food Products, Inc. had conditions in violation of OSHANC leading to the issuance of fifty-four (54) citations for willful violations of OSHANC Standards, twenty-three (23) citations for serious violations of OSHANC standards, and six (6) citations for other than serious violations of OSHANC standards, resulting in penalties being assessed against Imperial Food Products, Inc. totaling $808,150.

24. The claimant's injuries, and her spouse's damages resulting therefrom, were a direct and proximate result of the negligent breach by the defendants of statutory, regulatory, and common law duties described herein, and amounted to an unreasonable, oppressive and manifest abuse of discretion.

THE DUTIES AND THE NEGLIGENT ACTS AND OMISSIONS OF THE DEFENDANTS

25. Defendants owed duties to claimant and to her spouse which were imposed by federal and state statutes and regulations and by the common law, and which defendants negligently breached proximately and directly causing the injuries of claimant, and causing the claimant and her husband to suffer damages, amounting to an unreasonable, oppressive and manifest abuse of defendants' discretion. The claimants incorporate the allegations contained in paragraphs 1 through

23 of this Verified Claim herein, and makes additional allegations below.

Duties of Defendants

26. In 1970, the Congress of the United States enacted and the President of the United States signed into law the Occupational Safety and Health Act of 1970, codified at 29 U.S.C. §651 *et seq.* (sometimes "Federal OSHA Act").

27. Under 29 U.S.C. §667, a section of the Federal OSHA Act, a state may assume responsibility for development and enforcement of occupational safety and health standards on certain terms and conditions, provided that the state's program (sometimes "State OSHA Program") is or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

28. Under 28 U.S.C. §667, a State OSHA Program must provide sufficient legal authority and qualified personnel necessary for enforcement of such standards.

29. Under 28 U.S.C. §667, a State OSHA Program must have adequate funds devoted to the administration and enforcement of such standards.

MOATES VERIFIED CLAIM, CONTINUED . . .

30. Under the Federal OSHA Act and relevant federal regulations, including 29 C.F.R. §1901.1 *et seq*, it is the continuing duty of those states with a State OSHA Program to provide safety standards, funding, and enforcement at least as effective as the standards, funding and enforcement provided by the Federal OSHA Act and the regulations promulgated thereunder.

31. Pursuant to federal regulations located at 29 CFR §1901.1 *et seq*, a state which has adopted a State OSHA Program must maintain adequate funding and may not diminish its level of enforcement activity below that existing at the time of the agreement with the federal government leading to adoption of a State OSHA Program.

32. Under 29 U.S.C. §667 and 29 C.F.R. §1901.1 *et seq*, a state with a State OSHA Program must provide for the development and enforcement of such standards as will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor, and state agents responsible for execution of such programs must have sufficient legal authority to enforce these standards.

33. Under 29 U.S.C. §667 and 29 C.F.R. §1902.3 *et seq*, states which have adopted State OSHA Programs are required to have a sufficient number of adequately trained and

qualified personnel necessary for the enforcement of standards to be at least as effective as under the Federal OSHA Act.

34. Under 29 C.F.R. §1902.3 *et seq*, states which have accepted State OSHA Programs are required to provide sufficient funds to make enforcement of their plans as effective as enforcement of the Federal OSHA Act.

35. On January 26, 1973, North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations under a State OSHA Program received initial approval.

36. On October 6, 1976, the North Carolina State OSHA Program plan was certified as having completed all developmental steps.

37. Under N.C.G.S. §95-126 (b) (2)m, the North Carolina Department of Labor is designated as the agency required by law to administer OSHANC.

38. N.C.G.S. §99-133 creates and establishes within the North Carolina Department of Labor a division known as the Office of Occupational Safety and Health (sometimes called "North Carolina OSHA" herein).

39. Under N.C.G.S. §95-133, the Commissioner of Labor is required by law to appoint a Director to administer

MOATES VERIFIED CLAIM, CONTINUED . . .

North Carolina OSHA, subject to the direction and supervision of the Commissioner of Labor.

40. Under N.C.G.S. §95-133, the Director has the legal duty to carry out the responsibilities of the State under the State OSHA Program.

41. Under N.C.G.S. §99-133, the Director, subject to the approval of the Commissioner of Labor, is required to select a professional staff of qualified and competent employees to assist in the state-wide administration of OSHANC.

42. Under N.C.G.S. §95-133, subject to the general supervision of the Commissioner of Labor, the Director is made legally responsible for the administration and enforcement of laws, rules and regulations which it is the duty of North Carolina OSHA to administer and enforce, including the power, jurisdiction and authority to, among other actions, do the following: (1) uniformly superintend, enforce and administer applicable occupational safety and health laws of the State of North Carolina; (2) make or cause to be made all necessary inspections, analyses and research for the purpose of seeing that all laws and rules and regulations which the office has the duty, power and authority to enforce are promptly and effectively carried out; (3) make all necessary investigations, develop information and reports upon conditions of employee safety and health, and upon all matters relating to the

enforcement of this Article and all lawful regulations issued thereunder; and (4) issue all types of notices, citations, orders, and other pleadings, forms and notices necessary to enforce compliance with OSHANC.

43. Under N.C.G.S. §95-4, the North Carolina Commissioner of Labor is required to appoint such employees in the various divisions of the Department of Labor as may be necessary to perform the work of the Department.

44. Under N.C.G.S. §95-4, the Commissioner of Labor is required to make such rules and regulations as shall be necessary to properly carry out the duties imposed upon the Commissioner and the Department.

45. Under N.C.G.S. §95-4, the Commissioner of Labor is required to secure the enforcement of all laws relating to the inspection of factories, mills, workshops, and other institutions and to appoint inspectors.

46. Under N.C.G.S. §95-4, the Commissioner of Labor is required to inspect or cause to be inspected as often as practicable the factories and other establishments in this State where goods, wares or merchandise are manufactured, purchased or sold.

MOATES VERIFIED CLAIM, CONTINUED . . .

47. Under N.C.G.S. §95-4, the Commissioner of Labor is required to enforce the laws and prosecute violation of the laws relating to such inspections.

48. Under N.C.G.S. §95-136, to carry out the purpose and duties of OSHANC, the Commissioner of Labor, the Director of North Carolina OSHA, and their duly authorized agents are entitled to inspect workplaces and investigate whether violations of OSHANC exist.

49. Under N.C.G.S. §95-137, the Director of North Carolina OSHA or his authorized representative has a duty to issue citations to an employer where there are reasonable grounds to believe that the employer has not fulfilled his duties as prescribed in OSHANC and the rules and standards promulgated thereunder.

50. Under N.C.G.S. §95-138 and §95-139, civil and criminal penalties are established for employer violations of OSHANC.

51. Under N.C.G.S. §95-146, the Commissioner of Labor is required to furnish to the United States Secretary of Labor information and assurances that the State OSHA Program, North Carolina OSHA, is being administered by adequate methods and by standards and enforcement procedures which are and will continue to be as effective as federal standards.

MOATES VERIFIED CLAIM, CONTINUED . . .

52. Under N.C.G.S. §95-150, the Commissioner of Labor is required to submit to the General Assembly a budget and request for appropriations to administer adequately the Occupational Safety and Health Act of North Carolina and to give satisfactory assurance that this State will devote adequate funds to the administration and enforcement of standards as required by the Federal OSHA Act.

Defendants' Breaches of Duty

53. Upon information and belief, defendants had an insufficient number of inspectors, inspections, and programs for planned inspection of industries, as found in an investigation conducted by the United States Department of Labor (sometimes "the United States Department of Labor investigation") after the September 3, 1991 fire at the Imperial Food Products, Inc. plant in Hamlet, North Carolina.

54. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to provide or obtain adequate funding for enforcement of OSHANC.

55. In violation of the statutory, regulatory and common law duties described above, the defendants, through Commissioner of Labor John C. Brooks and others, failed to

provide adequate personnel and plans for inspection pursuant to OSHANC.

56. As a result of the acts and omissions of defendants through their officers, employees and agents John C. Brooks, Michael D. Ragland, James A. Oppold, and others who were also required by law to provide adequate staffing for D.O.L. and North Carolina OSHA, defendants failed to staff, hire, train and retain an adequate number of inspectors to discharge the duties of defendants described herein and in the Federal OSHA Act, OSHANC, and other statutory and regulatory laws.

57. Upon information and belief, the North Carolina Department of Labor failed even to use funds made available by the Federal Government for the hiring and training of inspectors and the carrying out of inspections.

58. Upon information and belief, North Carolina OSHA has a high rate of vacancy among inspectors and many other performance deficiencies attributable to the acts and omissions of defendants through their agents in failing to provide adequate staffing.

59. Upon information and belief, defendants did not maintain the staffing level required by law and commensurate with available federal and state funding.

MOATES VERIFIED CLAIM, CONTINUED . . .

60. Upon information and belief, and as found in the United States Department of Labor investigation, defendants focused inordinate resources on follow up visits to work sites already inspected, and diverted resources to pre-occupancy inspection of migrant labor camps, thereby leaving insufficient time and resources for unannounced general scheduled inspections of other companies, including the Imperial Foods plant in Hamlet, North Carolina.

61. Upon information and belief, North Carolina OSHA had serious operational deficiencies and was less effective than the federal program, as found in the United States Department of Labor investigation. Said deficiencies are a result of the failure of the North Carolina Department of Labor and North Carolina OSHA, through their agents, to discharge their statutory, regulatory and common law duties, including those owed to claimants.

62. Upon information and belief, North Carolina OSHA's administrative procedures were at the time of the Hamlet plant fire deficient and inadequate, as found in the United States Department of Labor investigation.

63. Upon information and belief, the programmed safety and health inspections conducted by defendant were insufficient, as found in the United States Department of Labor investigation.

MOATES VERIFIED CLAIM, CONTINUED . . .

64. Upon information and belief, defendants failed to carry out their duties under the Federal OSHA Act, the State OSHA Program, and OSHANC on a level at least as effective in providing safe and healthful employment and places of employment as the standards promulgated by Congress and the United States Department of Labor under the Federal OSHA Act.

65. The defendants' failure to fulfill their statutory, regulatory and common law duties was the proximate and direct cause of the injuries suffered by claimant, and the damages suffered by each claimant.

66. The defendants, through their agents and in the exercise reasonable care, should have conducted regular inspections of the Imperial Food Products plant in Hamlet, North Carolina.

67. Upon information and belief, Imperial Food Products, Inc. had other facilities, including in the City of Moosic in the Commonwealth of Pennsylvania. At least two inspections conducted on the Pennsylvania Imperial Foods plants in the mid-1980's by the United States Department of Labor, Federal OSHA division, led to citations being issued against Imperial Foods, Inc. for improper safety practices.

68. Upon information and belief, in one 1985 incident at the imperial Foods plant in Moosic, Pennsylvania,

MOATES VERIFIED CLAIM, CONTINUED . . .

employees were exposed to hot oil lines running near the floor between the fryer and the oven which were not protected. One of said lines burst and caused an employee to sustain burns over 35% of her body.

69. Upon information and belief, a 1987 inspection of the Imperial Foods plant in Moosic, Pennsylvania by Federal OSHA revealed that the means of ingress and egress were improperly constructed, labeled, and had inadequate accessibility. The OSHA inspector issuing citations for these violations, E. F. Donnelley, found that Imperial Foods top management demonstrated hostility and had "utter contempt for OSHA."

70. In the exercise of reasonable care, the defendants, through their agents, knew or should have known of Imperial Food Products, history of flagrant noncompliance with Federal OSHA requirements at the Moosic, Pennsylvania location that were identical or substantially similar to those in effect under OSHANC. Upon information and belief, said history of non-compliance was a matter of public record or was otherwise freely available to defendants who, having a duty to provide safe and healthful employment and places of employment at least equal to the standards mandated by the Federal OSHA Act, should in the exercise of reasonable care have known and acted upon such information by regularly inspecting and enforcing OSHANC standards at the Imperial Foods plant in Hamlet, North Carolina.

MOATES VERIFIED CLAIM, CONTINUED . . .

71. Upon information and belief, the conduct which Imperial Foods was cited for at its plant in Moosic, Pennsylvania was the same or a similar type of conduct to that which it was cited for in North Carolina after the September 3, 1991 fire, and which conduct caused the claimant's injuries.

72. In the exercise of reasonable care, defendants should have regularly inspected the Imperial Food Products, Inc. plant Hamlet, North Carolina, to determine whether hazards such as those present at the Imperial Food Products, Inc. plant in Moosic, Pennsylvania and other hazards were present in Hamlet. Defendants' failure to discharge such duties prior to the fire which injured the claimant was the proximate and direct cause of the injuries suffered by claimant and the damages suffered by each claimant.

73. Upon information and belief, the September 3, 1991 fire which resulted in the death of twenty-five persons, and the injuries of fifty-six persons including claimant at the Hamlet, North Carolina facility was not the first fire at that plant. In fact, Imperial Food Products, Inc. had suffered a fire at its Hamlet plant sometime on or before November 26, 1980, and yet another fire on or before July 5, 1983. The defendants, in the exercise of reasonable care, knew or should have known of the previous fires at the same employer's facility at the same site, and therefore should have inspected the employer to protect claimant from any further such occurrences.

MOATES VERIFIED CLAIM, CONTINUED . . .

74. The defendants, through their agents named, herein, owed a duty to each claimant to inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina, and to require abatement of the hazards there, including of the hazards that led to claimant's injuries. The defendants' failure to conduct such inspections or cause them to be conducted proximately and directly caused the claimant's injuries and the damages suffered by each claimant.

75. Upon information and belief, the defendants, through their agents, Commissioner of Labor John Brooks, Deputy Commissioner of Labor Michael Ragland, North Carolina OSHA Director James Oppold, and others, failed to require that Imperial Food Products, Inc. be inspected despite all the information available to defendants which demonstrated that the imperial Food Products, Inc. plant in Hamlet, North Carolina was highly likely to have working conditions in gross deviation from those prescribed by law.

76. Upon information and belief, the defendants, through Compliance Bureau Chief Richard Amos and District Safety Supervisor Frank Trogdon, failed to require that compliance officers or others in the employment of defendants inspect the Imperial Food Products, Inc. plant in Hamlet, North Carolina prior to the fire which gave rise to this action. Imperial Foods Products, Inc. had a presence in the State of North Carolina for a period of years before the fire which injured claimant, and in that entire time, no inspection was

conducted despite the manifest and patent need to inspect regularly the Imperial Foods plant in Hamlet.

77. Upon information and belief, John Brooks, Michael Ragland, James Oppold, Richard Amos, and Frank Trogdon had supervisory and other responsibilities to assign compliance safety and health officers, including but not limited to Douglas Jones, Charles Johnson, J. A. Bolton, David Poole, Tom Hayes, and Rodger Griffin, to inspect industries in Richmond County and surrounding areas, including the Imperial Food Products, Inc. plant in Hamlet, but did not direct that said plant be inspected. The defendants, through their agents, failed to require such inspections, thereby breaching duties owed to claimants.

78. Defendants in the exercise of reasonable care and by reasonable inspection knew or should have known of the violative conditions at the Imperial Food Products, Inc. plant in Hamlet, including, without limitation, the following: (1) the failure of Imperial Food Products, Inc. to furnish each of its employees conditions of employment which were free from recognized hazards, (2) the failure of Imperial Foods to maintain a fire suppression sprinkler system as required by law, (3) the failure of Imperial Foods to provide a proper evacuation plan and means of egress should the plant catch fire, (4) the failure of Imperial Foods to provide unlocked, unblocked and operable exits as required by law, (5) the failure of Imperial Foods to require adequate safety precautions considering the

highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used, (6) the failure of Imperial Foods to label adequately exits or identify doors which were not exits so employees could find their way out of the plant in event of a fire, (7) the failure of Imperial Foods to provide adequate fire alarm facilities to alert employees to smoke or fire, (8) the failure of Imperial Foods to conduct fire exit drills in order to create an orderly means of escape, and (9) the failure of Imperial Foods to train employees in fire extinguisher use and fire containment in emergencies to protect the lives of employees.

79. The defendants negligently acted or failed to act in all manners alleged in paragraphs 1-78 of this Verified Claim and thereby unreasonably, oppressively and manifestly abused their discretion. Defendants were also negligent and abused their discretion in other manners, including, but not limited to, the following:

a. Defendants negligently failed to maintain safety standards at the same level as required by the Federal Government.

b. Defendants negligently failed adequately to staff, train, and maintain personnel, despite the availability of federal and state funds for this purpose, and negligently

MOATES VERIFIED CLAIM, CONTINUED . . .

maintained an unacceptably high rate of vacancy among inspectors.

c. Defendants negligently failed to provide adequate funding for enforcement of OSHANC in violation of their statutory, regulatory and common law duties.

d. Defendants negligently failed to provide adequate plans for inspection pursuant to OSHANC in violation of their statutory, regulatory and common law duties.

e. Defendants negligently failed to use funds made available by the Federal Government and State Government for the hiring and training of inspectors and the carrying out of inspections.

f. Defendants negligently focused inordinate resources on follow up visits to work sites already inspected and negligently diverted resources to pre-occupancy inspection of migrant labor camps, thereby negligently leaving insufficient time and resources for unannounced general scheduled inspections of other companies and work sites, including the Hamlet plant.

g. Defendants negligently failed to provide for the safe and healthful employment and places of employment of claimant at least as effective as that provided

MOATES VERIFIED CLAIM, CONTINUED . . .

and required by the federal government pursuant to the Federal OSHA Act.

h. Defendants negligently failed to discharge their duties of inspection and enforcement under statutory, regulatory and common law, by not conducting regular inspection of the Hamlet plant, proximately causing the injuries suffered by claimant, and the damages suffered by each claimant.

i. Defendants in the exercise of reasonable care knew or should have known the history of noncompliance with the Federal OSHA Act by Imperial Food Products, Inc. in the Commonwealth of Pennsylvania, including as to the particular types of hazards Imperial Foods was cited for maintaining there - which hazards were also present at the Hamlet plant and which were a cause of the September 3, 1991 fire - and therefore should have regularly inspected the Hamlet plant, but negligently failed to do so at any time prior to the fire which injured claimant.

j. Defendants in the exercise of reasonable care knew or should have known of the previous fires at the Imperial Food Products, Inc. plant in Hamlet, North Carolina, but negligently failed to inspect said plant prior to the September 3, 1991 fire to determine whether the safety of the workers at that plant was being compromised.

MOATES VERIFIED CLAIM, CONTINUED . . .

k. Defendants negligently failed to conduct any inspection of the Hamlet plant prior to the September 3, 1991 fire, which inspection, if conducted, would have disclosed the violative conditions and defects and led to the issuance of citations and the abatement of hazards or the shutdown of the Imperial Food Products, Inc. plant in Hamlet, North Carolina. Defendants' negligent failure to conduct such inspections was a breach of their duties to claimants and was a proximate cause of the injuries suffered by claimant and the damages suffered by each claimant.

80. The acts of negligence complained of herein, and other acts of negligence by defendants which will or may be disclosed during discovery and trial of this action, were breaches of duty to each claimant and were the proximate and direct cause of the injuries suffered by claimant, and the damages suffered by each claimant, for which each claimant is entitled to recover.

81. That as a result of the negligent acts and omissions of the defendants, and also resulting from their unreasonable, oppressive and manifest abuses of discretion, claimant Mildred Lassiter Moates has been damaged in a sum in excess of TEN THOUSAND AND N0/100 DOLLARS ($10, 000. 00) representing her personal injuries.

82. That as a further result of the negligent acts and omissions of the defendants, and also resulting from their

MOATES VERIFIED CLAIM, CONTINUED . . .

unreasonable, oppressive and manifest abuses of discretion, claimant Olin Dellano Moates has been damaged in a sum in excess of TEN THOUSAND AND N0/100 DOLLARS ($10,000.00) representing his loss of consortium.

WHEREFORE, claimants prays that they each: (1) Have and recover of defendants a sum in excess of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) as a result of the negligent acts and omissions and the unreasonable, oppressive and manifest abuses of discretion by the defendants, and (2) such other and further relief as may be appropriate.

WOODROW W. GUNTER, II

By: /s/ George Wayne Goodwin
for Woodrow W. Gunter, II
Attorney for Claimants
Post Office Drawer 249
219 E. Franklin Street
Rockingham, NC 28379
Telephone: (919) 997-5558

MOATES VERIFIED CLAIM, CONTINUED . . .

NORTH CAROLINA INDUSTRIAL COMMISSION
I. C. NO. TA- 13067

MILDRED LASSITER MOATES AND OLIN DELLANO MOATES,	)	
Claimants,	)	AFFIDAVIT
	)	AND
v.	)	VERIFICATION
NORTH CAROLINA DEPARTMENT OF LABOR, AND NORTH CAROLINA DEPARTMENT OF LABOR, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,	)	
Defendants.	)	

Mildred Lassiter Moates and Olin Dellano Moates, having first been duly sworn, depose and say:

1. The name of the claimants are Mildred Lassiter Moates and Olin Dellano Moates. Mr. and Mrs. Moates reside at Route 1, Box 152AE, Rockingham, Richmond County, North Carolina 28379.

2. The claims asserted against the North Carolina Department of Labor, and the North Carolina Department of Labor, Division of Occupational Safety and Health, and the

MOATES VERIFIED CLAIM, CONTINUED . . .

names of the individual employees, upon whose negligence the claims are based, are included in the Verified Claim to which this Affidavit and Verification is attached.

3. Each claimant is seeking to recover all damages permitted under the North Carolina Tort Claims Act, N.C.G.S. §143-291 through N.C.G.S. §143-300.1. The claimed damages are described in the Verified Claim to which this Affidavit and Verification is attached.

4. The time and place the injury occurred are described in the Verified Claim to which this Affidavit and Verification is attached.

5. The facts and circumstances surrounding the injury and giving rise to this claim are stated and described in the Verified Claim to which this Affidavit and Verification is attached.

6. The contents of the Verified Claim to which this Affidavit and Verification is attached are adopted and incorporated herein by reference as though specifically set forth herein.

7. The contents of the Verified Claim are true to the knowledge of the undersigned, except as to those matters stated on information and belief, and as to those matters, they believe them to be true.

MOATES VERIFIED CLAIM, CONTINUED . . .

This 26th day of August, 1993.

/s/ MILDRED LASSITER MOATES

/s/ OLIN DELLANO MOATES

Subscribed and sworn to
before me this 26th day of August, 1993.

/s/ Sondra U. Honrese
Notary Public

My Commission Expires: February 26, 1998

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MOTION TO DISMISS CLAIM, FILED NOVEMBER 30, 1993

NORTH CAROLINA INDUSTRIAL COMMISSION
I. C. NOS. TA-12975 through TA-13076

MULTIPLE CLAIMANTS,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	MOTION TO
	)	DISMISS
NORTH CAROLINA DEPARTMENT	)	CLAIM
OF LABOR, and NORTH CAROLINA	)	
DEPARTMENT OF LABOR,	)	
DIVISION OF OCCUPATIONAL	)	
SAFETY AND HEALTH,	)	
	)	
Defendants.	)	

NOW COME the Defendants pursuant to Rule T201 of the Rules of the Industrial Commission and other applicable law and move the Commission for an order dismissing the plaintiffs' claims, on the basis of the failure to state a claim upon which relief can be granted, pursuant to N.C. R. of Civ. P. 12(b)(6); and, therefore additionally, on the basis of the sovereign immunity enjoyed by the defendants pursuant to N. C. R. Civ. P. 12(b)(1) and 12(b)(2). In support of their motion, the defendants attach a memorandum of law.

WHEREFORE, for the reasons stated in the attached memorandum of law, the defendants move the Industrial Commission for an order dismissing the plaintiffs' claims; and

MOTION TO DISMISS CLAIM, CONTINUED . . .

that the defendants have such other further relief as the Commission deems just and proper.

This the 30th day of November, 1993.

MICHAEL F. EASLEY
North Carolina Attorney General

/s/ Isham B. Hudson, Jr.
Senior Deputy Attorney General

/s/ David Roy Blackwell
Special Deputy Attorney General

/s/ Elisha H. Bunting, Jr.
Special Deputy Attorney General

/s/ Ralf F. Haskell
Special Deputy Attorney General

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